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Supreme Court, U.S.
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No. _____

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In The

SUPREME COURT OF THE UNITED STATES

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THOMAS W OLICK
PETITIONER

V

NATIONAL ASSOCIATION OF SECURITY DEALERS
RESPONDENT

==========

On Petition for Writ of Certiorari
To The United States Court of Appeals
For the Third Circuit

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PETITION FOR WRIT OF CERTIORARI

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Statement of Issues Presented

1. When it is proceeding in the operation of an employment clearing house, is the National Association of Security Dealers Inc. (the "NASD") liable in a private right of action by Thomas W Olick for damages caused by its' "bad faith" publications of defamatory statements?

2. Or, in the alternative, is the NASD entitled to only a qualified immunity when it proceeds in a non-judicial or a non-regulatory capacity?

List of parties

Petitioner:

Thomas W Olick

Respondents:

National Association of Security Dealers Inc.
Frederick L Reigel, Bankruptcy Trustee

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Statutes Cited

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1. Fifth Amendment 1

Rules Cited

1. 28 U.S. C. @1254 (1) 1
2. 28 U.S.C.A. 2101 (c) 1
3. Supreme Court Rule 10 (c). 1
4. 15 U.S.C.A. @ 78 (o-3i) 1, 2, 6, 11
5. Sherman Anti-Trust Act 1, 2, 8, 11

APPENDIX

Order of 9/10/99 by the U. S. Bankruptcy Court, Olick v NASD 96-22123T Adv No. 99-2117 App 1-2

Opinion of the U. S. District Court of E.D. Pa entered April 7, 2000, Olick v NASD 99-CV-5128 App 3-15

Opinion of the 3rd Circuit Court of Appeals entered 8/8/01, Olick v NASD 00-1677 App 16-19

Olick v NASD, Bankr. 96-22123, Adv. No. 99-2117, U.S. Bankr Court E.D. Pa. App 20-39

Petitioner, Thomas W Olick, respectfully requests that a writ of certiorari be issued to review the judgment of the U.S. Court of Appeals for the 3rd Circuit in Case No. 00-1677, In Re Olick.

Opinions Below

The opinion of the U. S. Court of Appeals for the 3rd Circuit is attached as Exhibit 1. The opinion of the District Court is attached as Exhibit 2. The Opinion of the Bankruptcy Court is attached as Exhibit 3.

Statement of Jurisdiction

The judgment of the U. S. Court of Appeals was entered on 8/8/01. The jurisdiction of this Court is invoked under 28 U.S. C. @1254 (1), 28 U.S.C.A. 2101 (c) and the Sup. Court Rule 10(c).

Constitutional and Statutory Provisions Involved

The Fifth Amendment to the United States Constitution provides in relevant part: "No person shall ... be deprived of life, liberty or property, without due process in law ..."

15 U.S.C.A. @ 78 (o-3i) states: "such an association shall not have any liability to any person for any actions taken or omitted in GOOD FAITH under this paragraph." (emphasis added)

The Sherman Act @1 prohibits contracts, combinations or conspiracies in restraint of trade. The NASD:

> "may be held civilly liable for acts taken to enforce (its) rules, if a member or non-member injured by the

> action can show that the (NASD) lacked legal authority for the action it took ... Since an exchange is an association of competing broker-dealers, any action it takes which limits the ability of members to compete with one another ... is per se a violation of the Sherman Act ..."
>
> Securities Regulation, 4 th Ed. Rathner & Hazen A.C.S., 991 (1990).

Statement of Case

The fundamental questions in this case is whether a person associated with an NASD Member Firm (i.e. Thomas Olick) is entitled to bring a suit for damages against the NASD for its knowing "bad faith" publication of (and encouraging others to publish) defamatory statements in its' employment clearing house (the "CRD"). The NASD knew its publications were untrue and were part of a illegally conspiracy to black list Olick from employment in the securities industry. This matter is being considered de novo by the U.S. Supreme Court.

Had the Congress desired to give the NASD an absolute immunity in its' CRD publications, it would not have qualified that immunity in 15 U.S.C.A. @ 78 (o-3i) by stating that only publications made in "good faith" were immune from liability. Thomas W Olick filed a complaint in the U.S. Bankruptcy Court (Exhibit 4) which alleged that the NASD breached a contract with him, negligently failed to comply with Bankruptcy Court Orders, and knowingly published in bad faith its own defamatory statements and encouraged others to publish false, embellished and

recast defamatory statements on its' CRD employment clearing house. Olick claims that these actions were an attempt to deprive him of employment and to drive him out of the securities industry.

In response, the NASD produced no evidence that its' publications were in "good faith" or that it had not encouraged others to publish defamatory statements. The NASD produced no evidence that those publications were part of its' regulatory or judicial duties. Instead, the NASD alleged that it was absolutely immune from a private right of action by Olick. The Bankruptcy Court, the District Court and the Third Circuit Court of Appeals, considering the matter de novo, agreed with the NASD and dismissed Olick's complaint.

The NASD's Rules are approved by the Securities and Exchange Commission (the "SEC"). The NASD's Rules require that reports of customer complaints published on the CRD must be complete and accurate. The NASD's Rules also require that copies of the CRD filings and customer complaints must be provided to the associated person in order to allow him an opportunity to reply to the allegations. The CRD filings must be amended within thirty (30) days of learning that the statements are not complete or accurate. In 1992, John Hancock Distributors Inc. published a series of anonymous customer complaints alleging that Olick had sold unsuitable or unregistered securities. Olick complained to the NASD that he was unable to respond to the anonymous complaints. Upon learning some of the customers' identities and receiving copies of their complaint, Olick

complained to the NASD that the complaints were alleged against Hancock (i.e. not Olick) and were embellished to increase their sting.

In disregard to the above, the NASD demanded that Washington Square Securities (Olick's subsequent employer) republish verbatim on the CRD the anonymous, recast and embellished reports of customer complaints. In cases where agents testified against member firms, the NASD told Olick that its' policy was to recast the customer complaints (e.g. customer Joseph Tellie) as if they were alleged against the agent and not the broker-dealer. They also informed Olick that Washington Square was also required to publish the defamatory reports even when Washington knew them to be untrue. If Olick did not testify against his broker dealer, the NASD stated that the customer complaint would not be recast against him.

In 1996, Hancock disclosed to Olick that there was no anonymous customer and that the file had been closed four years earlier. Those facts had been disclosed to the NASD by Hancock in 1992. But the NASD continued to publish the anonymous complaint until 1996. The NASD also published the recast report of Tellie complaint against Hancock until 2000, when Olick obtained a court order to have it expunged.

In 1992 and thereafter, the NASD also reported on the CRD that Olick was subject to an ongoing investigation concerning twelve customer complaints against him. The customer complaints were those of Robert Martin, Virginia Andrews, Joseph Tellie and others. In 1994, the NASD concluded its' investigation and

show the satisfactory conclusion of its investigation. Between 1998 and 2000, the Bankruptcy Court issued several orders directing the NASD to expunge from the CRD all references to Martin's, the Andrews' and others' customer complaints. The NASD refused, or was negligent, in expunging those reports. They were not expunged until almost two years later, i.e. after Olick filed his Bankruptcy complaint against the NASD. Because the filing of reports of customer complaints are not part of any judicial process where Olick is allowed a full and fair opportunity to defend against the claims, the defamatory statements that the NASD knew (and which it encouraged others to publish) were not being published in good faith and are not immune from an action because they were not the result of a judicial proceeding.

The NASD's Rules require member firms to review the CRD before making a hiring decision. As such, the NASD used the CRD as a clearing house for persons wishing to work in the securities industry. Because those bad faith defamatory statements concerning anonymous, recast, embellished and false customer complaints were being communicated to prospective employers (i.e. not just regulatory department of the various states), the NASD was not acting in a regulatory capacity. Because the NASD selectively publishes defamatory reports about only those persons who testify against broker dealers, and/or whom they unjustly wish to exclude from employment, the NASD was not acting in a qualified or regulatory capacity.

Reasons for Granting the Writ

1. THE PETITION SHOULD BE GRANTED BECAUSE THE OPINION BELOW IMPROPERLY DETERMINED THAT THE NASD HAS ABSOLUTE IMMUNITY FOR ACTIONS TAKEN IN A NON-JUDICIAL OR NON-REGULATORY ROLE

Had Congress wanted to grant the NASD absolute immunity it could have readily done that. However, Congress @ 15 U.S.C.A. @ 78 (o-3i) only provided the NASD with a qualified immunity for its' publications made in "good faith." There is no reason to protect with immunity one who proceeds in a malicious manner for an improper purpose. Any immunity the NASD had was forfeited when it proceeded in bad faith.

"The submission of a U-5 form and its transmission (upon request) to members of the NASD are not stages in the association's quasi-judicial regulatory process. In the first instance they are means by which the NASD administers an employment clearinghouse. By revealing the reason for termination, the form gives other members of the association potentially valuable information concerning the availability and suitability of potential employees. The information service is remote from a judicial proceeding ... to insulate the members from liability ... would be tantamount to allowing members of the NASD to blackball a former employee from employment throughout the large sector of the industry ..."

Bravati v Joseohthal 28 F3d 704, 708 (7th Cir 1994)

"(submission of the U-5 and its' transmission to members) is not part of a judicial proceeding and is not entitled to absolute privilege ... to hold doctrine of absolute immunity applicable to investigatory situations, especially those so very preliminary in nature, would give license to those of ill will and malice toward others to harass them unmercifully ..."

Glennon v Dean Witter Reynolds Inc. 83 F3d 132-4 (6th Cir 1996) citing Securities & Exchange Act of 1934 @ 15A, as amended, 15 U.S.C.A. @ 78o-3

Any immunity the NASD might posses is qualified (i.e. when acting in "good faith" in a judicial manner). "The condition attached to all such privileges is that they must be exercised in a reasonable manner for a proper purpose. The immunity is forfeited if the defendant steps outside of the scope of the privilege, or abuses the occasion. Thus the qualified privilege does not extend ... to the publication of irrelevant defamatory matter which has no bearing upon the public or private interest which is entitled to protection." Posser & Keaton on Torts, 832, 5th Ed citations omitted

"Since there is no social advantage in the publication of a deliberate lie, the privilege is lost if the defendant does not believe what he says ... (or) does not have reasonable grounds, or `probable cause' to believe it to be true."

id. Posser citing Russell v Geis, 1967, 251 Cal App 2d 560, 50 Cal Reptr. 569, other citations omitted

"In the present case ... no quasi-judicial hearing at which plaintiff ... was permitted to challenge defendant's ... allegations was ever held. Nor does it appear that the Department of Investigation was empowered, based upon its findings, to grant any tangible form of relief reviewable on appeal to the courts. In sum, the proceedings before the Department of Investigation lacked all of the safeguards traditionally associated with a quasi-judicial proceeding."

Toker v Polak 376 N.E. 2d 163, 44 N.Y. 2d 211 citing Bradley v Hartford Acc & Ind Co. 30 Cal App 3d 818, 106 Cal Repr 718, Mcafee v Feller, 452 S.W. 2d 56 (Tex Civ App)

"To clothe with absolute immunity communications made to a body acting in other than a quasi-judicial capacity, communications which because of the absence of a hearing may often go unheard of, let alone challenged, by their very subject, would provide an unchecked vehicle for silent character assignation. While we agree that it is of utmost import to select as members of our judiciary persons of unquestionable integrity and ability, a balance must be struck between this objective and the right of an individual to defend himself against attacks upon his character. We believe that the application of a qualified privilege provides the necessary balance fostering disclosure of information of public import other than that conveyed maliciously."

Toker v Polak 376 N.E. 2d 163, 44 N.Y. 2d 211, other citations omitted

II. THE PETITION SHOULD BE GRANTED BECAUSE THE OPINION BELOW CONFLICTS WITH DECISIONS GRANTING THE SAME RELIEF UNDER THE SHERMAN ANTI-TRUST ACT TO OTHERS WHERE THE NASD WAS NOT ACTING IN A REGULATORY OR JUDICIAL ROLE

The Sherman Act @1 prohibits contracts, combinations or conspiracies in restraint of trade. The NASD "may be held civilly liable for acts taken to enforce (its) rules, if a member or non-member injured by the action can show that the (NASD) lacked legal authority for action it took ... Since an exchange is an association of competing broker-dealers, any action it takes which limits the ability of members to compete with one another ... is per se a violation of the Sherman Act ..." Securities Regulation, 4 th Ed. Ratner & Hazen A.C.S., 991 (1990). The NASD has not alleged that it is immune for any violations of the Sherman Act in this particular instance.

The Appellant has complained that the NASD has created an informal policy (i.e. one which has not been reviewed or approved by the SEC and for which it has no legal authority to pursue) which recasts and embellishes customers' complaints for the purpose of silencing whistle blowers, shielding favored members and associated persons from the consequences of their illegal acts and creating a black list to drive persons out of the securities industry.

The courts have found that:

"nothing built into the regulatory scheme which performs the antitrust

function of insuring that an exchange will not in some cases apply its rules so as to do injury to competition which cannot be justified as furthering legitimate self-regulatory ends." Silver v NYSE 373 U.S. 341 (1963). The NASD's liability for antitrust due process has been followed in a number of civil cases, e.g. Zuckerman v Yost, 362 F Supp, 858 (N.D. Ill 1973), Howell v Growth Programs Inc., 451 F 2d 249 (5th Cir 1971). In Austin v Nat'l Ass of Securities, 757 F2d 676, 678 (1985), the court opined that: "Action to recover on various theories from registered national securities association ... district court must sift through various allegations of complaint to determine whether ... claims fell outside scope of defendant's disciplinary authority and thus, whether defendants were absolutely immune from liability on such claims. Securities Exchange Act of 1934, @ 15A et seq, as amended, 15 U.S.C.A. @ 78o-3 et seq. ... If, however the official fails to posit a valid function of office calling for his action, then the act falls outside the scope of his authority, and he must defend the claim ... The NASD performs myriad of activities in which it and its officers play no ajudicatory role. These include general administrative functions and the operation of the NASDAQ .... Defendants lack immunity for these activities ... Therefore, just as defendants enjoy no absolute immunity from prosecution for actions such as defamation and interference with

> business relations claims, the defendants possess no immunity from antitrust prosecution for alleged anti-competitive activities which fall outside of their official duties."
> id. Austin citing Williams, 728 F 2d @ 727.

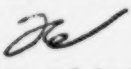
CONCLUSIONS

Pursuant to 15 U.S.C. @ 78 (o-3i), the NASD is liable to Olick for its "bad faith" intentional publication of (and encouragement of others to publish) defamatory statements on the CRD. Those publications were not done in the furtherance of any regulatory or judicial role. Those publications were maliciously done in violation of the NASD's mandate by the SEC.

Under the Sherman Anti-Trust Act, the NASD is liable to Olick for its illegal, malicious and intentional attempts to prevent him for competing for securities business and to drive him out of the securities industry.

The NASD does not have an absolute immunity. It has a qualified immunity. By its illegal and malicious actions, the NASD forfeited its' qualified immunity. Olick has been denied due process under the law. The action should be remanded back to the lower courts with appropriate instructions.

Respectfully Submitted:



T W Olick
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App. 1

UNITED STATES BANKRUPTCY COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

In Re:

THOMAS W OLICK and
KATHRYN OLICK
Debtors

No 96-22123T

THOMAS W OLICK
Plaintiff

v.

NATIONAL ASSOCIATION OF
SECURITY DEALERS, INC.
Defendant

Adv # 99-2217

ORDER

And Now, this 10th day of September, 1999, it is ORDERED that Defendant's Motion to dismiss this adversary complaint is GRANTED and this adversary complaint is hereby DISMISSED WITH PREJUDICE as the court finds that: (1) the Complaint fails to state a claim upon which relief can be granted since the actions complained of in the complaint were actions taken by Defendant in furtherance of its role as a securities regulator and: (a) no private right of action exists against Defendant under the Securities Exchange Act of 1934, 15 U.S.C. @ 78a, et. seq., or at common law for actions taken by Defendant in furtherance of its regulatory duties, see Desiderio v National Assoc. of Sec.

Dealers Inc., 2 F. Supp. 2d 516, 512 (S.D. N.Y. 1998); Niss v National Assoc. of Sec. Dealers, Inc. No 95 CV 75077, 1996 U.S. Dist Lexis 6044 (E.D. Mich March 29, 1996); Mihalakis v Pacific Brokerage Ser, Inc. No. 91 Civ. 994, 1991 WL 280236 at *4 (S.D. N.Y. Dec 23, 1991); Federal Deposit Ins. Corp. v National Assoc. of Sec. Dealers Inc., 582 F Supp 1154, 1155-58 (S.D. Iowa) , aff'd 747 F 2d 498 (8th Cir 1984); Gustafson v Strangis, 572 F Supp 1154, 155-58 (D. Minn 1983); and (b) Defendant is absolutely immune from liability for actions taken in furtherance of its regulatory duties, see Partnership Exchange Sec. Co v National Assoc. of Sec. Dealers, Inc., 169 F 3d 606, 608 (9th Cir 1999); Sparta Surgical Corp. v National Assoc. of Sec. Dealers Inc., 159 F 3d 1209, 1213-15 (9th Cir 1998); Barbara v New York Stock Exchange Inc., 99 F 3d 49, 58-9 (2nd Cir 1996); Austin Municipal Sec. Ind. v National Assoc. of Sec. Dealers inc., 757 F 2d 676, 692 (5th Cir 1985); and (2) that portion of the complaint which seeks an Order compelling Defendant to comply with this Court's April 15, 1999 Order entered in Case No. 96-22123T is MOOT since Defendant complied with the Order on or about June 11, 1999 after being served with same on or about May 10, 1999.

Reading, Pa.

/s/ Thomas M Twardowski

U.S. bankruptcy Judge

App. 3

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

In the Matter of: Thomas W Olick, et. al.	99-cv-5128 Adv. # 99-2117 Bnkr # 96-2123

MEMORANDUM AND ORDER

YOHN, J. APRIL 7, 2000

Currently pending before the court is the pro se appeal of Thomas W Olick from the September 10, 1999, order of the bankruptcy court dismissing with prejudice his two-count adversary proceeding against the National Association of Security Dealers Inc. ("NASD"). For the reasons that follow, I will affirm the bankruptcy court's dismissal of Olick's action against the NASD.

1. BACKGROUND AND PROCEEDINGS BELOW

A. REGULATION OF SECURITIES INDUSTRY

The "NASD is a self-regulatory private corporation with the Securities and Exchange Commission (SEC) as a national securities association." Desiderio V NASD, F 3d 198, 201 (2d Cir 1999). "As an integral part of a comprehensive system of regulation of the securities industry, the NASD regulates the over-the counter securities market, which includes securities firms and registered representatives who buy and sell over-the-counter securities." id. The NASD is "heavily regulated by the SEC

and the Securities Exchange Act of 1934 ("the Exchange Act")." Niss v NASD 989 F Supp 1302, 1303-04 (S.D. Cal 1997). "The NASD must comply with its own rules, the SEC's rules, and the Exchange Act." id. (citing 15 U.S.C. @ 78s (g)).

"As part of its statutory mandate, the NASD (1) is required to maintain records of its member security firms and their registered representatives, including the data related to the employment and termination of registered representatives, for at least five years, and (2) establish standards of uniform licensing and registration of securities professionals ..." Meyers v NASD No. 95-CV-75077, 1996 U.S. Dist Lexis 6044, *2 (E.D. Mich March 29, 1996). To do this, the NASD utilizes two forms. See id. @ **2-3. The first form is known as the U-4 ("Uniform Application for Securities Industry Registration and Transfer") and must be filed with the NASD whenever a securities firm employs a registered representative. See id. The second form, which is known as the U-5 ("Uniform Notice of Termination of Securities Industry Registration"), "must be completed by a securities firm upon termination of a registrant's employment." see id. The U-4 and the U-5 forms both require that the securities firm disclose any customer complaints about registrant. See id. at *3 n.2 & n.3. Both forms also must be amended to change any inaccurate or incomplete information. see id. The NASD maintains the U-4 and U-5 forms in a Central Records Depository (the "CRD"), which is accessible to federal and state regulatory authorities and to some extent, the investing public. See id.*3-4

B. OLICK'S ADVERSARY COMPLAINT

On June 7, 1999, Olick filed a pro se adversary complaint against the NASD alleging negligence and a breach of contract. In his complaint, Olick stated that he was a registered securities representative licensed to sell securities. Olick had been associated with John Hancock Distributors Inc. ("John Hancock"), and later with Washington Square Securities, Inc. which was also known as Northwestern National ("Washington Square").

According to Olick's complaint, Hancock and Washington Square filed with the NASD several inaccurate U-5 forms, containing false customer complaints about Olick. On April 15, 1999, the Bankruptcy Court for the Eastern District of Pennsylvania ordered the NASD to expunge from the CRD any and all records of complaints filed on behalf of Robert or Irene Martin against Olick. The crux of Olick's complaint was that the NASD was negligent in failing to comply with the court's order in a timely fashion, and was also negligent in allowing inaccurate and incomplete information to be published originally in the CRD. The complaint also asserts a breach of contract.

C. Proceedings Below

The NASD filed a motion to dismiss the plaintiff's complaint for failure to state a claim pursuant to Federal Rule of Civil Procedure 12 (b)(6). In its motion to the dismiss, the NASD argued that the complaint failed to state a claims upon which relief could be granted because the

plaintiff did not have a private right of action against the NASD under the Exchange Act. The NASD also argued that it was immune from damages for all acts undertaken with respect to the performance of its regulatory duties. Olick filed a memorandum of law in opposition to the defendant's motion to dismiss.

On September 10, 1999, the bankruptcy court granted the NASD's motion to dismiss plaintiff's complaint for failure to state a claim upon which relief can be granted. Order of Bankr. Ct., Sept. 10, 1999. The bankruptcy court found that the complaint failed to state a claim because "the action complained of in the complaint was actions taken by the Defendant in the furtherance of its role as a securities regulator and (a) no private right of action exists against Defendant under the Securities Act of 1934, 11 U.S.C. @ 78a, et seq, or at common law for actions taken by Defendant in furtherance of its regulatory duties ... and (b) Defendant is absolutely immune from liability for actions taken in the furtherance of its regulatory duties ..." id. The court then held that the "portion of the complaint which seeks an Order compelling Defendant to comply with the Court's April 15, 1999 Order entered in Case No. 96-22123T is MOOT since Defendant complied with this Order on or about June 11, 1999 after being served with the same on or about May 10, 1999." id.

On October 18, 1999, Olick filed a Notice of Appeal from the September 10, 1999, order of the bankruptcy court. Olick, as appellant, and the NASD, as appellee, both filed appellate briefs on

November 19, 1999. On the same day, Olick filed a Motion to extend the time nunc pro tunc for the submission of appellant's brief because his brief was untimely under the court's scheduling order. The court granted Olick's motion to extend time nunc pro tunc for the submission of appellant's brief.

II. STANDARD OF REVIEW

The district court, sitting as an appellate tribunal, applies a clearly erroneous standard to review the bankruptcy court's factual finding and a de novo standard to review the conclusions of law. See In re Siciliano 13 F 3d 748, 750 (3d Cir. 1994).

Moreover, in deciding a motion to dismiss, the court must "accept as true all allegations in a complaint and all reasonable inference that can be drawn from them after construing them in the light most favorable to the non-movant." Jordan v Fox, Rothschild, O'Brien & Frankel, 20 F 3d 1250, 1261 (3d Cir 1994) (citing Rocks v Philadelphia 868 F2d 644, 645 (3d Cir 1989). "A court may dismiss a complaint if it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations." Hishon v King & Spalding 467 U.S. 69,73 (1984).

Because a motion to dismiss requires the court to make conclusions of law, I will apply the de novo standard in reviewing the decision of the bankruptcy court.

III. DISCUSSION

In its Order of September 10, 1999, the bankruptcy court dismissed the plaintiff's complaint because the court found that "the actions complained of in the complaint were actions taken by the Defendant in a furtherance of its role as a securities regulator," and thus, there was no private right of action against ht NASD under the Exchange Act; and the NASD is absolutely immune from liability for actions taken in the furtherance of its regulatory duties. See Order of Bankr. Ct. Sept. 10, 1999. I agree and will affirm the bankruptcy court's decision.

A. PRIVATE RIGHT OF ACTION UNDER THE EXCHANGE ACT

Olick contends that the NASD's publication of allegedly false and defamatory material is subject to a private right of action because the NASD published the information in "bad faith." See Appellant's Brief at 3. The NASD argued in response that the complaint must be dismissed because there is no private right of action against the NASD for an alleged violation of its own rules. See Appellee's Brief at 9-12.

The Third Circuit has not yet addressed whether a party may assert a private cause of action against the NASD under the Exchange Act for a violation of the NASD's own rules. Court's in other circuits considering this issue have concluded that parties have no private right of action against the NASD for violations of its own rules, or for

actions taken in conjunction against the NASD under the Exchange Act. See Desiderio v NASD, 191 F 3d 198, 207-08 (2d Cir 1999) (holding that the plaintiff did not have a private right of action against the NASD under the Exchange Act and dismissing state law claims brought against the NASD); Sparta Surgical Corp. v NASD 159 F3d 1209, 1213 (9th Cir 1998) (explaining that "(i)t is undisputed for actions taken to perform its self-regulatory duties under the (Exchange) Act"); Shah v NASD No 98-C-5355, 1999 WL 240342, at *8 (N.D. Ill April 9, 1999) (noting that "at least three court have concluded that the NASD is not subject to a private right of action under Sections 15A or 19 of the Exchange Act"); Niss v NASD 989 F Supp 989 F Supp 1302, 1308-09 (S Dist. Cal 1997) (finding that no private right of action exists for the NASD's violation of its own rules and dismissing plaintiff's common law negligence claim against the NASD); Meyers v NASD No 95-CV-75077, U.S. Dist. LEXIS 6044 at *14 (E.D. Mich. March 29, 1996) (holding that there is no private right of action against the NASD for the violation of the NASD's own rules and dismissing plaintiff's complaint for failure to state a claim); Mihalakis v Pacific Brokerage Servs., Inc No 91-CIV-994, 1991 WL 280236 at *4 (S.D.N.Y. Dec 23, 1991) (holding that @ 15A of he Exchange Act dies not create an implied private right of action against the NASD); FDIC v NASD 582 F Supp 72, 74 (S.D. Iowa 1984) (holding that a "customer of a member of the national securities association has no common law cause of action against the association for negligent admissions or supervision

of the member"); Gustafson v Strangis 575 F Supp 1154, 1158 (D. Minn 1983) (holding that there is no private right of action against the NASD for violations of NASD rules).

In Meyers, a case very similar to the case at hand, the court considered whether a plaintiff could maintain a suit against the NASD for the NASD's alleged failure to investigate the information contained on the U-4 and U-5 forms filed with the CRD. See Meyers, U.S. Dist LEXIS 6044, at *13 (explaining that the "crux of the (plaintiff's) complaint stems from the NASD's alleged duty to investigate the U-4 and U-5 forms before filing then" in the CRD). The Meyers court observed that "a majority of courts have held that there is no private cause of action against the NASD for a violation of its own rules." see id. The court then dismissed the section of the plaintiff's complaint, finding that the plaintiff had made "an unsuccessful attempt to create a private cause of action for the violation of the NASD rules when non (sic) exists." See is at *14.

Considering the weight of persuasive authority holding that there is no private right of action against the NASD for a violation of its own rules, I hold that the bankruptcy court was correct in its conclusions that Olick may not maintain a private cause of action against the NASD. Accordingly, I will affirm the bankruptcy court's decision and order the plaintiff's complaint dismissed on this ground.

B. ABSOLUTE IMMUNITY FOR THE NASD FOR REGULATORY ACTIONS

The NASD also argues that the court should dismiss the plaintiff's complaint because the NASD is absolutely immune from liability for actions taken in a regulatory or adjudicatory context. See Appellee's Brief at 12-15. Olick contends that the NASD is entitled only to qualified immunity. See Appellant's Brief at 11-12(2). 1

1. The appellant's brief has two pages marked with a page number "12". To differentiate between the two, I will refer to the first page number "12" as "12(1)" and the second page number "12" as "12(2)".

The bankruptcy court held that the NASD was absolutely immune from liability for actions taken in furtherance of its regulatory duties. See Bankr. Court Order Sept. 10, 1999. I will agree with the bankruptcy court's conclusions and will affirm on this ground as well.

The Third Circuit has not addressed the issue of whether the NASD is immune from liability for regulatory actions. The Second, Fifth and Ninth Circuits have all decided this issue, however, and have held that the self-regulatory organizations, such as the NASD, are immune from liability for actions taken in furtherance of their regulatory duties. See Partnership Exchange Securities Co. v. NASD 169 F 3d 606, 608 (9th Cir. 1999) (dismissing plaintiff's complaint against the NASD because a "self-regulatory organization that exercises quasi-governmental powers with its regulatory capacity" is entitled to

absolute immunity); Sparta Surgical Corp v NASD 159 F 3d 1209, 1213 (9th Cir 1998) (holding that a self-regulatory organization, such as the NASD, is "immune from liability based on the discharge of its duties under the Exchange Act"); Barbara v New York Stock Exchange 99 F 3d 49, 59 (2nd Cir 1996) (opining that the doctrine of "absolute immunity is particularly appropriate in the unique context of the self-regulation of the national securities exchanges" in holding that the New York Stock Exchange was immune from liability for claims out of its federally mandated conduct of disciplinary proceedings); Austin Municipal Securities Inc. v NASD 757 F 2d 676, 692 (5th Cir 1985) (holding that the NASD "is entitled to absolute immunity for its role in disciplining its members and associates"); see also Shah v NASD No 98-C-5355, 1999 WL 240342, at *7 (N.D. Ill. April 9, 1999) (holding that when the NASD is acting properly within its regulatory role it is immune from claims for tortous interference with business relations). I find the reasoning of these courts persuasive. Therefore, I hold that the NASD is immune from suit when acting under the aegis of the Exchange Act's delegated authority. See Sparta 159 F3d 1214. (2)

(2) In his brief Olick, Olick argues that the NASD is entitled to qualified, not absolute, immunity for publication of U-5 forms in the CRD. See Appellant's Brief at 5-7 (citing Bravati v Josephthal Lyon & Ross Inc. 28 F 3d 704, 708 (7th Cir 1994) and Glennon v Dean Witter Reynolds Inc 83 F 3d 132, 132-34 (6th Cir 1996), for the proposition that the NASD's

publication of U-5 forms on the CRD is subject to a qualified privilege). The cases cited by Olick, do not stand for the proposition that the NASD is entitled only to qualified immunity. Both Bravati and Glennon addressed the issue of whether a securities firm (not the NASD) was entitled to absolute immunity for the filing of U-5 forms in the CRD. See Bravati 28 F 3d at 708 (holding that under Illinois law a securities firm was entitled to a qualified privilege for statements submitted on a form U-5); Glennon 83 F3d at 133-34 (holding that under Tennessee law a securities firm was entitled to a qualified privilege for statements submitted on a form U-5). Thus, the cases are inappropriate because they do not address whether the NASD is absolutely immune from liability for statements published in the CRD.

In this case, the Plaitniff's complaint against the NASD revolves around the NASD's inclusion of allegedly defamatory statements on the U-5 forms that were included in the plaintiff's record in the CRD. (3) The act of maintaining records, including records containing customer complaints, in the CRD is a regulatory duty of the NASD that is undertaken under the Exchange Act's delegated authoruty. I therefore conclude that the NASD is immune from suit for these actions. Accordingly, I will affirm the decision of the bankruptcy court and dismsiss the plaintiff's complaint for failure to state a claim upon which relief can be granted. (4)

IV. CONCLUSIONS

Upon consideration of the order of the bankruptcy court of September 15, 1999, and from appellate briefs submitted by appellant and appellee, I conclude that the bankruptcy court was correct in its conclusions that Olick's complaint failed to state a claim upon which relief can be granted. Accordingly, I will affirm the bankruptcy court's decision.

An appropriate order follows.

(3) In his appellate brief, Olick argues that the bankruptcy court failed to consider his claim for violations of the Sherman Antitrust Act. See Appellate's Brief at 7-11. The adversary complaint filed by Olick, however, did not attempt to state an antitrust claim. Instead, Olick's complaint stated claims only for negligence and breach of contract. Thus, I conclude that the bankruptcy court did not err in failing to consider the antitrust cause of action because it was never properly before the bankruptcy court.

Furthermore, as to Olick's breach of contract claim, Olick complaint does not clearly identify the contractual relationship which he alleges was breached by the NASD (other than a conclusory statement in the plaintiff's complaint that "(i)n 1984, the plaintiff entered into a contract ... with the NASD wherein he became licensed as a registered representative to sell securities"). See Compl. @7. The alleged contract itself was never made a part of the record and never identified a specific provision of it which he felt

had been breached. Therefore, the bankruptcy court's dismissal of the breach of contract claim was also proper for this reason.

(4) In the bankruptcy court order, the court found that the NASD had been served on or about May 10, 1999, with the bankruptcy court's order of April 15, 1999 (ordering the NASD to expunge the Martin complaints from Olick's files in the CRD). See Order of Bankr. Ct. Sept 10, 1999. The bankruptcy court further found that the NASD complied with the court's earlier order on or about June 11, 1999. Se id. I do not find that the bankruptcy court's factual findings to be clearly erroneous. See In re Siciliano 13 F 3d at 750. Accordingly, I will affirm the portion of the bankruptcy court's decision which held that the "portion of the complaint which seeks an Order compelling Defendant to comply with this Court's April 15, 1999 Order entered in case No. 96-22123T is MOOT since Defendant complied with this Order on or about June 11, 1999 after being served with the same on or about May 10, 1999. See Order of Bankr. Ct. Sept. 10, 1999.

UNREPORTED NOT PRECEDENTIAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NO 00-1677

IN Re; THOMAS W OLICK; KATHRYN OLICK
Debtors

THOMAS W OLICK

APPELLANT

V

NATIONAL ASSOCIATION OF SECURITY DEALERS INC.

FREDERICK L. REIGLE_ESQ.
(chapter 13 Trustee), Trustee

On Appeal from the United States District Court for the Eastern District of Pennsylvania
(D.C. Civ. No. 99-cv-05128)
District Judge: Hon. William H. Yohn Jr.

Before Sloviter, Roth and Cowen, Circuit Judges

(Filed August 8, 2001)

OPINION

PER CURIAM

In June 1999 Thomas W Olick filed a pro se adversary complaint against the National Association of Security Dealers (NASD) alleging negligence and breach of contract. According to Olick, he was a registered agent licensed to sell securities who had been associated with John Hancock Distributors Inc. and later with Washington Securities Inc. Olick alleges that Hancock and Washington Square filed with the NASD several inaccurate U-5 forms containing false customer complaints about Olick. On April 15, 1999, the Bankruptcy Court for the Eastern District of Pennsylvania ordered the NASD to expunge from the Central Records Depository (CRD) all records filed on behalf of Robert or Irene Martin against Olick. Olick contends that the NASD was negligent in failing to comply with that order in a timely fashion and in allowing false information to be published in the CRD in the first place. He also alleges breach of contract.

The NASD filed a motion to dismiss the complaint for failure to state a claim. The Bankruptcy Court granted the motion, finding that the Securities Exchange Act does not provide a private right of action against the NASD concerning actions taken in furtherance of its regulatory duties and that the NASD enjoyed absolute immunity from liability

from actions taken in furtherance of its regulatory duties. The court found the portion of the complaint which sought an order compelling compliance with its April 15, 1999, order moot because the NASD complied with the order on or about June 11, 1999, having been served with the order on or about May 10, 1999.

The District Court affirmed the Bankruptcy Court decision, citing decisions from other circuits holding that there is no private right of action against the NASD under the Securities Exchange Act for violating its own rules or for actions taken to perform its self-regulatory duties under the Act and that the NASD enjoys absolute immunity from liability for actions taken in furtherance of its regulatory duties. We agree with the cases cited. See e.g. Desiderio v NASD 191 F3d 198 (2d Cir. 1999); Sparata Surgical Corp. v NASD 159 F 3d 1209 (9th Cir 1998); Barbara v New York Stock Exchange 99 F 3d 49 (2d Cir. 1996); Austin Municipal Securities Inc, v NASD, 757 F 2d 676 (5th Cir 1985). As the District Court found, the act of maintaining records, including records containing customer complaints, in the CRD is a regulatory duty of the NASD undertaken under the aegis of the Securities Exchange Act's delegatory authority. Accordingly, the NASD enjoys absolute immunity.

Next, the District Court found no merit in Olick's breach of contract claim because the complaint does not identify the contractual relationship in question. Not only was the alleged contract never made a part of the record, but Olick failed to identify which provisions were allegedly breached. We agree. To the

extent that Olick contends that signing a U-4 form created a contractual relationship, we agree with the NASD that it does not. Finally, the District Court found no error in the Bankruptcy Court's finding that the NASD was served with that court's April 15, 1999 order on May 10, 1999 and complied with it on or about June 11, 1999, agreeing with the Bankruptcy Court that Olick's motion to compel compliance is moot. Again, we agree with the District Court.

Accordingly, finding no merit in Olick's arguments we shall affirm the judgment of the District Court.

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

THOMAS W OLICK Plaintiff	Bnkr 96-22123
v	Adv No 99-2117
National Association of Security Dealers Inc. Defendant	Jury Trial Demanded

COMPLAINT

Plaintiff Thomas W Olick brings this cause of action against the National Association of Security Dealers Inc. (the "NASD") for negligence and other torts, as follows:

1. Parties

1. Thomas W Olick is an adult individual residing at 4014 Crestview Ave, Northampton County, Easton, Pennsylvania.
2. Defendant NASD is a non-profit Delaware corporation licensed to do business in the Commonwealth of Pennsylvania, maintaining an office and may be served at 1835 Market Street, Philadelphia, Pa. 19103.

II. Jurisdiction

3. Jurisdiction is based upon 28 U.S.C.A. 1334 and Section 157(b)(2) of 28 U.S.C.A. 28 subsection (E).

4. This is a "core" proceeding in that the Plaintiff seeks an Order requiring the Defendants to comply with the

April 15, 1999 order of this Bankruptcy Court and to cure intentional negligence of the NASD which is interfering with the administration of the Bankruptcy Estate and the Debtor/Plaintiff's ability to earn a living.

III. Venue

5. The Plaintiff avers that Venue is proper in the Eastern District of Pennsylvania pursuant to Section 1408 (1) of 28 U.S.C.A.

6. Venue is proper in the Eastern District of Pennsylvania in which the Debtor is a resident and where the NASD conducts business from an office maintained in this jurisdiction, Plaintiff seeks to compel compliance with an order of this court in the Eastern District of Pennsylvania, the Plaintiff seeks damages related to a negligent tort committed in the Eastern District of Pennsylvania and the Plaintiff seeks to enforce his rights in a contract executed in the Eastern District of Pennsylvania.

IV Individual Allegations

7. In 1984, the Plaintiff entered into a contract (the "Contract") with the NASD wherein he became licensed as a registered representative to sell securities.

8. The Contract created duties between the parties which are further elaborated in the NASD's Manual, sometimes referred to as the Rules of

Fair Practice (the "Rules").

9. The NASD maintains a Central Records Depository (the "CRD") which publishes, but is not limited to, a summary of all security violations and customer complaints alleged against the Plaintiff.

10. When the he sought employment with a securities firm associated with the NASD (a "Member Firm"), the Rules require Member Firms to review the Plaintiff's CRD file to determine his character and history before hiring him.

11. The Plaintiff cannot sell securities unless he is employed by or associated with a Member Firm.

12. Prior to September 1992, the Plaintiff was associated first with the Member Firm John Hancock Distributors Inc. and later with Washington Square Securities (a.k.a. Northwestern National).

13. Article IV @ 3(a) of the Rules states that when a Member Firm terminates a registered representative (a.k.a. an associated person), they are required to file a Uniform Notice of Termination (a "U-5") which provides "complete" and "accurate" details of the termination or "apparent misconduct while associated with the member firm."

14. The Rules require Member Firms to report on a U-5 any customer complaint about a terminated associated person.

15. Article IV @ 3 (b) of the Rules require that the Member Firm amend the U-5 within 30 days of learning "facts or circumstances causing any information set forth in said notice (the U-5) to become inaccurate or incomplete."

16. The NASD published a Notice to Members 88-67 which states that "members and their associated persons may be subject to administrative, civil, and even criminal penalties for failing to provide complete and accurate information on Forms U-4 and U-5."

17. On April 15, 1999, this Court entered an order in Adversary Proceeding 99-2008 (Olick v Martin) compelling the NASD to expunge from the CRD "all records of any complaint lodged or filed on behalf of Robert or Irene Martin, or both, against Thomas W. Olick" (the "Order").

18. On April 16, 1999, the Plaintiff transmitted a certified copy of the Order to the NASD.

19. Since the above date, the Plaintiff has made repeated telephone calls and sent additional written letters requesting the NASD to comply with the Order.

20. The NASD has refused, and continues to refuse, to comply with the Order.

21. In the fall of 1992, the Plaintiff filed a complaint with the NASD wherein he alleged claims which

included that the John Hancock Distributors Inc. ("Hancock") had filed false and defamatory U-5s alleging various customer complaints against the Plaintiff.

22. In Dec. 1992, the NASD received copies of the customer complaints from Hancock and conducted an investigation.

23. In a 1992 complaint letter to Hancock, Joseph Tellie alleged that "we feel that John Hancock was at fault for not informing of the risks of the investments ...".

24. In a U-5 submitted to the NASD, Hancock recast and embellished the Tellie's complaint to increase its "sting" and recast it to be against the Plaintiff stating " ... customers Joseph and Elizabeth Tellie allege that Mr. Olick misrepresented the performance of three limited partnerships to them." (the "Tellie U-5").

25. In 1992, the Tellies filed a NASD Arbitration Complaint against Hancock, NASD No. 92-04046 (Tellie v Hancock).

26. Nowhere in their NASD Complaint, or during the hearings, did the Tellies make any accusations against or allege misconduct by the Plaintiff.

27. The Tellies won NASD Arbitration 92-04046 and received an award entered against Hancock in the amount of $25,000 plus interest.

28. In April 1996, Hancock filed two amended Tellie U-5s which reiterated the aforementioned untrue statements and inaccurately stated that the Tellie's NASD Arbitration 92-04046 asserted claims against the Plaintiff.
29. Immediately thereafter, the Plaintiff again complained to the NASD's Boston Office that the aforementioned amended Tellie U-5s were inaccurate.

30. The NASD informed the Plaintiff that if a customer complains about a broker-dealer in a letter or in an arbitration, it is the NASD's policy to recast the complaint and NASD award as one against the registered representative.

31. Various other inaccurate and incomplete U-5s alleging customer complaints against the Plaintiff were published by Hancock between 1992 and 1996.

32. In each case, the Plaintiff complained to the NASD about the aforementioned Hancock U-5s.
33. On Jan 11, 1999, the Plaintiff sent a detailed letter to the NASD recounting the various inaccurate and incomplete statements Hancock made on the U-5s.

34. The NASD has refused to correct, or request that Hancock correct the above U-5s as outlined in the 1/11/99 letter.

35. Also in 1992, Laslo and JoAnne Zamolyi filed a customer complaint

letter with Hancock (the "Zamolyi Complaint") which stated:

"It seems John Hancock represented this (Damson Oil & Gas L.P.), as Tom Olick pointed out, with a highlight of a partnership coverage if 100% of the investment is not recovered in 10 years. Would you address this issue as well as the one of leveraging. Did John Hancock mislead Tom Olick who in turn sold this investment to Edwin Ahlum?"

36. In 1992 Hancock submitted a U-5 to the NASD which recast and embellished the Zamolyi Complaint to increase the "sting" and re-direct the complaint against the Plaintiff stating "... Mr. Olick misrepresented the performance of limited partnerships."

37. Hancock later amended the Zamolyi U-5 to state that "no improprieties were found."

8. However in April 1996, Hancock filed an additional amendment to the Zamolyi U-5 which stated "following our investigation, Mr. and Mrs. Zamolyi were reimbursed a total of $58,029.02 ..."

39. However, the second amended Zamolyi U-5 was incomplete and inaccurate because, in addition to the aforementioned defects, it failed to state that Zamolyi's reimbursement was made because of promise by a Hancock employee and Zamolyi's complaint that Hancock breached the reimbursement agreement/promise.

40. In April 1996, the Plaintiff complained to the Boston NASD Office about the above inaccuracies and incomplete statements in Hancock's second amended Zamolyi U-5.

41. The Boston NASD Office refused and continues to refuse to demand that Hancock correct the Zamolyi U-5s.

42. Various other U-5s were published by Hancock between 1992 and 1996 which included similar inaccurate and incomplete reports of customer complaints.

43. Despite repeated requests by the Plaintiff, the NASD has refused and continues to refuse to correct or demand that Hancock correct the various inaccurate and incomplete U5s.

44. On or about August 17, 1998, the Plaintiff complained to the NASD's Kansas City Office about incomplete and inaccurate U-5s filed by Washington Square Securities regarding the Plaintiff's termination and various alleged customer complaints.

45. The alleged customer complaints in most cases were identical to those filed by Hancock.

46. The NASD's Kansas City Office again reiterated the NASD's policy to recast, embellish and allow the filing of inaccurate and incomplete U-5s to implicate the registered agent or increase the "sting" of the

complaints where such statements were made against the Member Firm and not the associated person.

47. Also in the 1/11/99 letter to the NASD, the Plaintiff enumerated the various inaccurate and incomplete statements Washington Square made on the U-5s.

48. The NASD has refused and continues to refuse to correct or demand that Washington Square correct the inaccurate or incomplete statements on the aforementioned U-5s.

49. By knowingly publishing statements on the CRD which summarize the inaccurate and incomplete U-5s submitted by Hancock and Washington Square, the NASD is allowing the CRD to become a "black list" directed at the Plaintiff's future employers and to damage the Plaintiff in his property and reputation.

50. The NASD, by its policies and intentional negligence in its duty to regulate the Member Firms, associated persons and the filing of U-5s, has failed to perform its duties of fair dealing under the "Contract".

51. There is no benefit to the public or the securities industry for the NASD to allow the Member Firms to publish intentional misrepresentations, to file incomplete or inaccurate U-5s, or to allow the CRD to function as a "black list."

52. Any immunity, if one ever existed,

was forfeited by the NASD by its knowing publication of deliberate lies.

53. In his letter of 1/11/99, the Plaintiff informed the NASD that the above Member Firms were using the U-5s as a means of silencing the Plaintiff, a "whistle blower", so as to hide their illegal activities in the selling of securities, while at the same time allowing the Member Firms to conceal customer complaints against favored registered representatives.

54. As a result of the Plaintiff's Complaints, the NASD has in fact found that Hancock had used illegal sales practices in the marketing of various limited partnerships.

55. However, as he discussed in his 1/11/99 letter, the NASD has taken no steps to stop attacks on the whistle blowers or to conceal wrongdoings by the Member Firms and favored registered representatives.

56. By its failure to properly discipline the Member Firms and guilty parties, and through its selective enforcement of the Rules, the NASD has created an atmosphere which encourages apparent misconduct by the Member Firms and their associated persons.

57. In a settlement entered by this Court on 12/17/98 of Adv. Proceeding 96-2349 Bnk No 96-22123 (the "Settlement"), various customers of the Plaintiff withdrew their customer complaints filed with Hancock.

58. The withdrawal of the customer complaints caused the relevant prior U-5s filed by Hancock and Washington Square to become inaccurate and incomplete.

59. On 3/26/99, the Plaintiff sent a copy of the Settlement to Hancock and requested that the U-5s be amended.

60. Hancock has refused to amend the U-5s.

61. On 5/3/99, the Plaintiff filed a complaint with the NASD regarding the refusal of Hancock to amend the U-5s.

62. The NASD has refused to take any action to require Hancock to amend the U-5s.

63. On 5/3/99, the Plaintiff sent a copy of the Settlement and requested that Washington Square amend the U-5s.

64. Washington has refused to amend the U-5s.

65. By its negligence in not requesting that Hancock amend the U-5s to reflect the Settlement, the NASD has damaged the Plaintiff in his property and reputation by continuing to publish incomplete and inaccurate U-5s and defamations on the CRD.

66. By its aforementioned actions, the NASD has demonstrated that it is unwilling and unable to perform its duties under the Contract or as mandated by its charter.

67. The NASD has no justification or legitimate excuse for refusing to expunge the Martin's complaints as required by the Order.

68. In 1995, the Plaintiff complained to the Philadelphia NASD Office that they had caused to be published on the CRD a statement alleging an investigation into fifteen (15) customer complaints against the Plaintiff and that the results of the investigation were not published.

69. The Plaintiff complained that the CRD report of the "pending" investigation was hurting his opportunities for employment in the securities industry.

70. On May 8, 1995, the Philadelphia NASD Office sent to the Plaintiff and Hancock a report stating that "no action was warranted ... (and) the hold on your registration has been released."

71. The NASD investigation was actually completed several years previously and the NASD was negligent in not releasing the above statement and releasing the "hold" on the Plaintiff's registration earlier.

72. The NASD has refused to amend or cause Hancock to amend the statements on the CRD relating to the "pending" investigation to show its favorable results.

73. In 1989, the Plaintiff filed a complaint with the Pennsylvania

Securities Commission regarding unregistered securities he had purchased from Pro Gas Inc.

74. As a result of the above complaint, the Plaintiff, Pro Gas Inc. and the Pa. Securities Commission entered into a settlement which provided for the payment of $188,000, plus interest, by Pro Gas Inc. to the Plaintiff and his fellow investors (the "Pa. Settlement").

75. The Pa. Settlement contained no provision which prevented the Plaintiff from being associated with any broker dealer or selling any kind of registered security offered by a registered broker dealer.

76. The NASD has negligently reported inaccurate and incomplete statement on the CRD concerning the Pa. Settlement stating: "... Olick ... are barred for 1 year from being associated with any issuers (of securities) in Pa. ... for 2 years from ... being associated with any issuer relying on an exemption (203)."

77. Since 1992, the Plaintiff has repeatedly requested the NASD to correct the above inaccurate and incomplete statements regarding the Pa. Settlement on the CRD.

78. The NASD has refused and continues to refuse to take any steps to correct the above inaccurate CRD statements.

79. At various times since 1992, the Plaintiff has sought suitable

employment in the securities industry.

80. The Plaintiff had received offers for employment but these offers were withdrawn when the Member Firms examined the CRD file.

81. One such offer was a contract that the Plaintiff signed with Metropolitan Life which was subsequently terminated because of the inaccurate and incomplete disclosures on the CRD.

82. The Plaintiff was told by his immediate supervisor at Metropolitan Life that the reason for the termination of the contract was the disclosures on the CRD.

83. The Plaintiff also lost opportunities for suitable employment with other firms (e.g. Marketing One) because of the inaccurate and incomplete disclosures on the CRD.

84. As a direct result of the above torts committed by the NASD, the Plaintiff has been damaged in his property, reputation and standing in the securities industry in an amount in excess of $75,000.

85. Between 1992 and the present, the NASD has repeatedly informed the Plaintiff that they would take steps to correct any inaccurate or incomplete statements on the U-5s and the CRD.

86. The Plaintiff justifiably relied upon

the representations of the NASD.

87. The NASD had no intention of making the corrections they promised the Plaintiff.

88. The investigations that the NASD alleged to have performed as a result of the Plaintiff's complaints were a sham designed to lull and trick the Plaintiff into complacent reliance upon their misrepresentations, to protect the Member Firms and to increase the damages suffered by the Plaintiff.

COUNT 1

Negligence

89. The Plaintiff incorporates by reference paragraphs 1 through 88 as if stated at length herein.

90. The NASD is negligent in not timely complying with the Court's Order.

91. The NASD is negligent since 1992 to the present by refusing or failing to enforce its Rules requiring Hancock and Washington Square to file complete and accurate U-5s and to amend the U-5s when information is discovered which make the previously filed U-5s incomplete and inaccurate.

92. The NASD is negligent by intentionally and knowingly allowing incomplete and inaccurate U-5s about the Plaintiff to be published on the CRD between 1992 and the present.

93. The Plaintiff has been damaged as a

direct or proximate cause of the NASD negligence in his property, reputation and opportunity to seek employment in the securities industry.

94. As a direct and proximate cause of the NASD negligence, the Plaintiff has been unable to obtain suitable employment in the securities industry.

95. The Plaintiff has suffered emotional distress because of the NASD's negligence in an amount in excess of $75,000.

96. Because of the NASD negligence, the Plaintiff has been required to expend valuable time resources and incur expense, including attorney fees, in excess of $100,000 to reduce the damages caused by the failure of the NASD to enforce its Rules.

97. The NASD negligence is evidence of a pattern of outrageous and willful conduct, without regard for the rights and property of the Plaintiff, and which is designed to encourage, or create an atmosphere which encourages, illegal behavior designed to damages the Plaintiff, and similarly situated persons, in their property and reputations. The Plaintiff is entitled to punitive damages to discourage the NASD and similarly minded persons from such outrageous activities in the future.

98. The Plaintiff is entitled to the recovery of all expenses incurred in

this litigation.

99. The Plaintiff is entitled to interest at the highest rate allowable by law for any damages awarded from 1992 and until such time as the damage award is paid by the NASD.

THEREFORE, the Plaintiff requests that this Court issue an order COMPELLING the NASD to correct any and all incomplete and inaccurate U-5s published on the CRD, that the NASD be COMPELLED to comply with the Order to expunge any and all references to any complaint filed by or on behalf of Irene and Robert Martin, the award for damages for the Plaintiff and against the NASD in the amount of $1,175,000, punitive damages, expenses, interest at the highest rate allowable by law, and any other damages that the Court determines to be just and proper.

COUNT II

Breach of Contract

100. The Plaintiff incorporates by reference paragraphs 1 through 99 as if stated at length herein.

101. In signing the Contract there was a expectation of fair dealing between the Plaintiff and the NASD.

102. By its negligence and selective enforcement of the Rules, the NASD has breached its obligation to deal fairly with the Plaintiff and has allowed Member Firms to use the NASD, and in particular the CRD, as a means of silencing, damaging or to seek

revenge upon the Plaintiff and similarly situated persons, as an operating black list and as means of hiding security violations by Member Firms and their associated persons, and as a means of protecting favored agents from the consequences of their apparent misconduct.

103. By hiding apparent misconduct of the Member Firms and their favored agents, the CRD operates as a means of perpetuating, or creates an atmosphere which encourages, continued misconduct by Member Firms and their associated persons to the detriment of the public and any Member Firms who may rely on the CRD's information to subsequently hire the favored agents.

104. The above mentioned policies of allowing or encouraging the recasting and embellishment of customer complaints has breached the fair dealing duties anticipated in the Contract and the Rules which require:

"A member, in the conduct of his business, shall observe high standards of commercial honor and just and equitable principles of trade."

Rules Article III @ 1

105 (1). The Plaintiff justifiably relied upon the NASD representation that it and its Member Firms would employ "high standards of commercial honor and just and equitable principles of trade."

105 (2). By allowing and condoning fraud, defamations, and the filing of false and inaccurate U-5s, the NASD violated the Plaintiff's reasonable expectation for fair dealing in the Contract.

106. There is no immunity, either qualified or absolute, for the NASD's knowing publications of deliberate lies as previously noted in the U-5s of Washington Square, Hancock or the Pa. Settlement.

107. The aforementioned publications were aimed at the Plaintiff's future employers and were designed to damage the Plaintiff in his property, reputation and standing in the securities industry.

108. As a direct and proximate result of the NASD's aforementioned breach of the Contract, the Plaintiff was damaged in his property, reputation and standing in the securities industry in an amount in excess of $1,000,000.

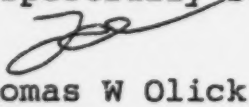
109. As a direct and proximate result of the aforementioned breach of the Contract, the Plaintiff suffered emotion distress in an amount in excess of $100,000.

110. As a direct and proximate result of the aforementioned breach of the Contract, the Plaintiff was damaged in an amount in excess of $100,000 in time and expenses, including attorney fees.

111. The Plaintiff is entitled to recover costs of this suit and interest on any judgment at the highest rate allowable by law from 1992 until such time as the judgment is paid by the NASD.

THEREFORE, the Plaintiff request that he be granted an judgment against the NASD in an amount of $1,200,000, costs of this suit, interest in the highest amount allowable by law, and any other relief that this court deems just and proper.

Respectfully Submitted:



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